Bethlehem Temple Learning Center, Inc. *and* Cecelia Rainey. Case 9–CA–35206

April 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On August 20, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions, a supporting brief, a motion to strike the judge's decision, and a brief in support of its motion to strike the judge's decision. The General Counsel filed an opposition to the Respondent's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by discharging the alleged discriminatees for their protected concerted activity. The credited testimony establishes that on Saturday, July 26, 1997, the alleged discriminatees attended a meeting at which the Respondent asked its employees to sign a noncompetition agreement. At this meeting, several of the discriminatees voiced their concern about the agreement. Two of the Respondent's officials, Vice President Mary Jackson and Pastor Johnnie Johnson, indicated at the meeting that they did not want employees asking questions about the agreement during the meeting, and that employees would be terminated if they did not sign the agreement. They told employees, however, that if they did not want to sign the agreement they should return the agreement unsigned with their reasons for not signing written on the agreement. Jackson stated that if the employees had questions about or problems with the agreement they should arrange to discuss their concerns with Jackson in private.

The alleged discriminatees returned their agreements unsigned. After the meeting, Jackson observed the alleged discriminatees gathered together in the parking lot discussing the noncompetition agreement.

The following business day (Monday), the Respondent informed the discriminatees that they were terminated for failing to sign the noncompetition agreement.

At the hearing, the Respondent denied that any of the alleged discriminatees were terminated for failing to sign the agreement. Rather, the Respondent offered other reasons for the terminations, such as tardiness, insubordination and failing to report to work as scheduled, which the judge found—and we agree—are pretextual. In addition, the Respondent argued that it made alternate staffing arrangements because it harbored concerns that the alleged discriminatees would all not show up for work that Monday.[4]

In agreement with the judge, we find that the General Counsel established a prima facie case, under *Wright Line*,[5] that the alleged discriminatees' protected concerted activity—most notably the concerns they raised about the noncompetition agreement and the further dis-

[1] We find no merit to the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence. We also deny the Respondent's motion to strike the judge's decision, as there is no support for the Respondent's contention that the judge's rulings deprived the Respondent of its right to a fair and impartial trial.

With respect to the Respondent's contention that it was unfairly deprived of the right to submit evidence of a criminal conviction admissible under Fed.R.Evid. 609 for the purpose of attacking the credibility of Cecelia Rainey, we find that the judge did not abuse his discretion in ruling that the Respondent made this proffer at a point too late in the trial. See generally *U.S. v. Mitan*, 966 F.2d 1165, 1176 (7th Cir. 1992), citing Fed.R.Evid. 611(a) (trial court has broad discretion to reject rebuttal and surrebuttal testimony and does not abuse it where party had an opportunity to introduce the evidence at an earlier point).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to include appropriate cease-and-desist language as well as the language set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

In his decision, the judge stated that the Respondent's consultant, Rayford T. Blankenship, engaged in certain alleged misconduct at the trial. The judge has recommended that the alleged misconduct be referred to the General Counsel for institution of appropriate disciplinary action. Having duly considered the matter, we shall further modify the judge's recommended Order, in accordance with Sec. 102.177(e)(1) of the Board's Rules and Regulations, to include language referring the alleged misconduct to the General Counsel for the purpose of conducting an investigation of the alleged misconduct and performing other duties consistent with Sec. 102.177(e)(1) of the Board's Rules.

We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] In his decision, the judge notes that the Respondent contends that under *K-Bar-B Youth Ranch*, 325 NLRB 409 (1998), an employer is privileged to terminate employees who care for "at-risk" children when those employees threaten not to work, even if such a threat was concerted. The judge found the Respondent's contention inapplicable here because, unlike the instant case, the employees in *K-Bar-B Youth Ranch* had actually called in sick to protest their treatment by their employer. We note, however, that in fn. 2 of the Board's decision in that case, the Board found it unnecessary to rely on the judge's contention, that "even if the sick-out were found to be protected concerted activity, the employees' conduct was indefensible." Thus, contrary to the judge and the Respondent, that case does not establish an exception to the rule that employees may not be terminated for engaging in protected concerted activity.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

cussions held in the parking lot after the meeting—was a motivating factor in the Respondent's decision to terminate them. We agree with the judge that the timing of the terminations, the pretextual reasons given for the terminations, the Respondent's negative reaction to the employees' attempts to ask questions about the agreement at the meeting, and the Respondent's reliance on its concern that the employees would engage in a work stoppage, all suggest that the true motive for the discharge was the discriminatees' concerted opposition to the Respondent's noncompetition agreement. We further note that the Respondent has denied that the discharges were due to the alleged discriminatees' failure to sign the noncompetition agreements, and has failed to offer any reason for the terminations apart from the reasons we have rejected above. We thus find that the Respondent has failed to sustain its burden under *Wright Line* of showing that these employees would have been terminated even in the absence of their protected activity. Accordingly, we adopt the judge's finding that the terminations violated Section 8(a)(1) of the Act as alleged.

ORDER

The Respondent, Bethlehem Temple Learning Center, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days form the date of this Order, offer Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and Lashon Valentine (Davis) full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and Lashon Valentine (Davis) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the alleged misconduct by the Respondent's consultant, Rayford T. Blankenship, as set forth in section III,C of the judge's decision, is referred to the Investigating Officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.117(e) of the Board's Rules.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT terminate employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and Lashon Valentine (Davis) full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and Lashon Valentine (Davis) whole for any loss of earnings and other interim benefits resulting from their terminations, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and Lashon Valentine (Davis) and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

BETHLEHEM TEMPLE LEARNING CENTER, INC.

Mark G. Mehas, Esq., for the General Counsel.
Rayford T. Blankenship and *John Sturgill, Consultants* and *Todd Durham, Esq*., for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on March 3 and 4 and May 11 and 12, 1998. Subsequent to an extension in the filing date requested by the Respondent, briefs were filed by the General Counsel and the Respondent. The proceeding is based on a charge filed on August 15, 1997,[1] by Cecelia Rainey, an individual. The Regional Director's complaint dated November 5, 1997, alleges that Respondent Bethlehem Temple Learning Center, Inc., violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and LaShon Valentine (Davis), because they engaged in protected concerted activities and to discourage employees from engaging in those activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

[1] All following dates will be in 1997 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the operation of a day care center in Cincinnati, Ohio. During the past 12 months it derived gross revenues in excess of $250,000 from its operations, and it annually purchases and receives goods and materials valued in excess of $3000 directly from points outside of Ohio. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent's center was started about 3 years ago to provide a program for preschool children as well as an after school program and summer program for children up to age 12, and it operates in facilities under the sponsorship of Bethlehem Temple Church.

Director Sharon Morgan runs the day-to-day operation of the center with duties including, but not exclusively limited to, payroll, staffing, educational curriculum, and personal relations with parents of the children attending the center. Mary Jackson is business administrator/vice president of Bethlehem Temple Church and she hired Morgan as director. Johnnie L. Johnson is pastor of Bethlehem Temple Church, chief executive officer, and president of the Respondent, however, he has little to do with the day-to-day operation of the center.

As part of her duties as business administrator of the Church, Jackson began a review of the center after noticing an increase in expenses and total employee salary, despite stagnant figures in school enrollment. She discovered several apparent problems including what she perceived was the falsifying of timecards, personal time not being properly documented, unethical behavior of employees, and excessive absences and tardiness of employees. The latter problem could cause a "ratio" problem which put the day care facility in violation of Ohio licensing standards which required certified care givers for specific numbers of children. These concerns prompted her to meet with Pastor Johnson and to call a staff meeting for July 26. Pastor Johnson testified that he spoke with an attorney a day or so before the meeting to find out whether a noncompetition agreement would be legal. This was said to be a concern because two or three employees, including Patty Jones, had left the center and taken children enrolled in the center into their own home care centers.

Jackson works at an office separate from the center, hires the director of the center but not the other employees, and she testified that she is "not interested in employees because they don't exactly work for me." After looking at the employees' timecards in her review of payroll expenses, she concluded that employees were not clocking in and out properly. She started an "investigation" and to prepare an audit of the information showing (among other things), scheduled hours, tardiness, absences, and early clock outs approximately 2 weeks prior to the July 26 staff meeting. The audit (dated February 23, 1998), however, was not done or completed until late December 1997. The audit was done by Jackson's secretary who looked at the timecard and any handwriting that was on them, according to Jackson's instructions, to audit their time and see what they were not entitled to be paid for. In none of the instances were the employees (or director Morgan) consulted, and Jackson's "investigation" and conclusion that the cards were tampered

with was based on her viewing of the cards prior to the staff meeting and the secretary's figures that were subsequently prepared.

Based on her preliminary review, Jackson met with Pastor Johnson on some undisclosed date and apparently brought her package of concerns to his attention, and it was decided to have a mandatory staff meeting on Saturday, July 26, and notices to this effect were mailed to each employee.

Cecelia Rainey was employed as a lead "teacher"[2] in the infant room. She was late arriving on July 26, and Jackson who was conducting the meeting spoke to her about the dress code. A confidentiality agreement was discussed, passed around, and collected as employees signed them. The employees then were asked to sign a noncompetition agreement after being told generally that former employees had left and started day cares, causing the Respondent to loose children. Rainey spoke up, and said it seemed unfair as it would bind them for 3 years, and asked what the 50-mile radius would include and learned that it would not be just outside the city limits but also would include Dayton and parts of Kentucky. She asked if that could be negotiated and was told "no, it's not negotiable." She asked about the 3-year period and testified that the response was "everything was nonnegotiable." She said Pastor Johnson spoke up and said, "[I]f you want to work here, sign the paper." Other employees were also asking questions and Jackson got on the microphone and let everyone know that if they wanted to keep their employment they needed to sign. Rainey wrote, "will not sign" on the agreement (which had her typed name on it), and the agreements were collected by Jackson's secretary.

When the meeting ended, a group congregated outside and had an informal discussion in which they complained about the noncompetition agreement. The group including Rainey and Ursula Nelson, Kevin Ellerbe, Elaina Bohanon, Tiffany Johnson, Nakia Frye, Dwight Mobley, Robert Echols, and LaShon Valentine. She specifically recalled LaShon Valentine saying, "Well, they can't fire us" and that she responded "They can't fire all of us for this. We're all going to work Monday."

Alleged discriminatee Robert Echoes did not appear as a witness, however, several of the other witnesses described his presence at the meeting and in the postmeeting group in the parking lot. In addition to Rainey's detailed testimony described the background type information of the subjects discussed at the meeting, other witnesses agreed that a litany of management complaints were covered, however, the main subject of controversy with several of the employees was the matter of signing the noncompetition agreement.

It was quickly established that a number of items relating to staff conduct were discussed during a 2-hour meeting. Witness Rainey reaffirmed the subject matters discussed during the meeting during the Respondent's cross-examination, most specifically by affirming the consultant's questions about what she had said in her affidavit to a Board agent. Successive witnesses also affirmed the subject matter of the meeting both on their direct examination and by reaffirming and corroborating their testimony by agreeing to questions asked by the Respondent consultant which inquired if they had made such statements in their affidavits.

[2] The Respondent's child care "teachers" were required to have a high school diploma, but apparently were not actually certified as teachers and did not hold a degree, although they were referred to as teachers.

Elaina Bohanon worked for 2 years as a teacher's assistant. She attended the Saturday staff meeting and first signed the noncompetition agreement, but they crossed her name out before turning it in because she wanted to have it looked over by a lawyer. She understood from Jackson's remarks that she had to sign it or "don't bother to come to work then Monday," and she confirmed that Rainey had asked questions at the meeting about having the agreement looked at by a lawyer. Bohanon (who worked various shifts), testified that she was scheduled to work Monday, July 25, from 4 to 10 p.m., but that she received a call from Director Morgan at 7:30 a.m. telling her not to bother coming in, that she was fired for not signing the noncompetition contract.

Rainey was scheduled to work Monday July 28 at 7:30 p.m. Rainey's mother, Patricia Ann Hill, testified that earlier on Monday she had spoken with her granddaughter, Elaina Bohanon, who also was an employee at the Center who told her that she had been fired and to tell Cecelia not to come because she also had been fired. As Hill was partially dependent on Rainey's paycheck, she called the Center at about 10 a.m. and spoke to Director Morgan about Rainey. Morgan confirmed to Hill that Rainey was fired and told her to tell Rainey "don't come in." Hill asked for a letter to that effect so she could notify the gas and electric company. Morgan said she would convey the request to Jackson, and subsequently, Hill learned that the utility company had been notified that Rainey was no longer employed.

Rainey also testified that at some time after the meeting she went to Johnson and:

> I told him—uh, basically after the meeting I said, "My parents are going to move. And whenever they move, I want to open a day care." I said, "So if you hear, through the grapevine that I opened a day care, it's not in regards to me trying to be against the church," because they have this thing where if you're not totally for the church then you're against the church.
>
> So I went to him, as my pastor, and I told him that was my dream, that I am—was in CBA classes, that I want a day care.

It also was brought out that after Rainey's sister, Patty Jones, had been terminated by the Respondent, well before the meeting was held, she obtained a county certification to watch children in her home.

Ellerbe testified that he recalls going to work promptly at his usual starting time at 8:30 a.m. on July 28, and that Morgan called him into her office as he entered, told him that because he had refused to sign the noncompetition agreement they chose to fire him. When he said he wasn't the only one, Morgan showed him a handful of timecards of other employees, and told him they were all terminated for the same reason. Ellerbe testified that at some point in the Saturday meeting Jackson said if you have a question about the agreement, don't sign, bring it to me and we'll meet privately and discuss it, and that Jackson and Johnson said that if they did not want to sign it to write the reasons why on the agreement. He said he was fired before he could speak to anyone but called Jackson that afternoon and was connected to Pastor Johnson. Ellerbe told Johnson he had been discharged and spoke about the noncompetition agreement and asked if it could be limited to people who start their own business and Johnson responded, "[T]hat that was how it is and how its going to be."

Donna Mobley was a teacher assistant in the infant room. When she questioned Jackson at the meeting and then understood that the agreement prohibited competition within 50-miles of the center, she wrote "need more information" and "refuse to sign" on the agreement before returning it. Immediately after the meeting she attempted to discuss the matter with Jackson, Jackson told her she wasn't going to discuss anything, the matter was over and to call for an appointment. Mobley arrived at work on Monday shortly before 8 a.m. and saw Tiffany Johnson who told her there was no reason to go in because the people who didn't sign the contract no longer worked there. Mobley went inside and spoke directly with Morgan and asked her if she was working, and Morgan replied that "Mary Jackson has stated that the people that did not sign the noncompetition contract was not working at Bethlehem Temple any more." Mobley said, "That's crazy." And then Morgan said, "Well you can talk to Bishop Johnson. He should be in, in about 5 or 10 minutes.'' Mobley (who was then with Tiffany Johnson), testified that, "I told him that I—we did not know we wasn't gonna have no job coming Monday morning. And he said—we asked to discuss it with him. And he said, "[E]verything was discussed at the meeting," and if—and if we don't get off his property he will call the police."

Mobley returned on July 29 and asked the secretary for the noncompetition agreement or some statement or reason why she was no longer working there. She was told to come back in an hour and then was told that Jackson would send her a paper in the mail giving the cause why she was fired, however, nothing was ever received.

Nakia Frye was an assistant teacher. She wrote, "refuse to sign" on her noncompetition agreement and turned it in. Frye understood that Jackson said, "[I]f we did not sign we would be terminated" and that she spoke with the group in the parking lot about the noncompetition agreement and whether they were fired because they didn't sign. At the time Frye was pregnant, "very sick," and on leave of absence since Wednesday the 23rd. She was scheduled to return on August 6 and her doctor had faxed an excuse to the center on July 24 (the fax document was found in Respondent's personnel files). Because of the concerns raised about the noncompetition agreement, and after hearing that others had been fired, Frye called the center on Monday the 28th and spoke with Morgan who told her that as she had not signed the noncompetition agreement, she was terminated.

Lashon Valentine was a lead teacher in the school age classroom. She testified that during the July 26 meeting when she asked a question about the 50-mile radius in the noncompetition agreement, Pastor Johnson grabbed the mike and said, if she refused to sign, she would no longer be working there. She thereafter left the meeting early but asserts that she did not tell anyone that she was quitting. She reported for work about 4:45 p.m. on July 28 for her normal 5 p.m. shift, and was met at the front desk by Jackson's secretary who asked what she was doing there. When Valentine said she was there to clock in, the secretary told her she no longer worked there as she had refused to sign the noncompetition agreement. She then saw Jackson and Pastor Johnson in Morgan's office, knocked on the door and was invited to come in. She asked under what grounds was she terminated and what would show on her record, and they said it would go under "dismissed." Jackson asked her, "[D]id you sign the paper?" and when Valentine said "no," Jackson said since she did not sign, she "no longer worked there." Valentine inquired about the enrollment of her child and Johnson said she had 2 weeks to find another placement, and she left. Before the 2 weeks had passed, Jackson again told her she would have to find another placement as Pastor Johnson would not accept anyone's children who did not want to sign the noncompetition agreement.

Ursula Nelson was a lead teacher. She recalled that at the staff meeting, Jackson indicated that she didn't want questions and that if you were asking questions that meant that you didn't want your job. Nelson signed the noncompetition agreement but did not date it. She testified that when Jackson's secretary started to collect them, Nelson told her she had changed her mind, didn't want to sign, and wanted to scratch it out. The secretary said no that she had to collect it but she could get it back at a later time. After the meeting Director Morgan asked Nelson if she had signed and Nelson told her "no" and that she wanted to see if they could legally do it because she had not heard of that type of agreement before. She then sat in the parking lot with Morgan (who drove her to and from the meeting) where she observed some of the other alleged discriminatees. She was scheduled to report at 9:30 a.m. on Monday but called Morgan to tell her she was going to be late. Nelson testified that Morgan said, "[D]id you hear?" that she didn't have to come to work because she was terminated, because Johnson had decided Sunday that if she didn't sign the contract that she didn't have a job.

Dwight Mobley was an assistant teacher. At the meeting he was given a noncompetition agreement with someone else's name on it. He scratched out that name, initialed it, then printed his name, but he did not sign the agreement as he didn't agree to its terms. Mobley recalled that Jackson made some comment that "if you did not sign it, you could look elsewhere for work or you can make an appointment to see me, regarding why you did not sign it." Mobley testified that he arrived at work on Monday 5 minutes before his 9 a.m. starting time. His timecard was not in its normal location, he went and asked Director Morgan where it was, and she told him that since he did not sign the agreement he was terminated. He returned to the center 2 days later seeking to retrieve his school diploma. A secretary conveyed his request to Jackson and he heard her tell the secretary that "no, he cannot get it."

Tiffany Johnson was a teacher's aid. She attended the meeting but did not sign the noncompetition agreement and wrote "Refused" on the document before turning it in. After the meeting she joined the several other alleged discriminatees in the parking lot. She testified that she was unsure of her scheduled reporting time for Monday because she had been doing a lot of coming in for other people but believed that she came in at 7:30 a.m. She had worked for one-half hour in the infant room when Morgan came in and informed her that Johnson had "said that anyone that hadn't signed the agreement on Saturday at the meeting was terminated on Monday." She asked to wait for Johnson and spoke to him about half an hour later. She asked if she could speak with him to get in writing why it was that she was terminated and he told her that as she no longer worked there, he had nothing to say to me and that she would receive something in the mail, however, nothing was ever received.

Director Sharon Morgan testified that her duties include staffing and payroll matters and that she had been employed with the Respondent since September 1994. She testified that she did not talk to Rainey on Monday and that Rainey did not

come in at 6 p.m. when her shift was to start. She said that Kevin Ellerbe came in late and she terminated him because he had been warned on several occasions. She said that Ursula Nelson called about 10 a.m. to say she would be late for her 9:30 a.m. shift, and she told Nelson she was terminated because she had been warned on several occasions about being late and absent.

Morgan testified that after the Saturday meeting she was told to come to work early on Monday because "we had heard that some of them wasn't coming" and she had to make sure she had adequate staffing. She also asserted that she was not instructed to terminate any individuals that morning. She said that Tiffany Johnson was already at work when she arrived. Morgan was told that Johnson was being loud and saying stuff and that she called a local radio station to complain about the noncompetition agreement, so Morgan said, "I terminated her for insubordination." She said Elaina Bohanon was due at 11 a.m. but called earlier and said she didn't know what she was going to do, and then never showed up. Morgan said Johnson went to the parking lot after being terminated and was seen talking to parents and to Donna Mobley. Morgan asserts that Mobley then came in late, and was fired for insubordination as she had previously been warned about the dress code and being late. Morgan said that Nakia Frye was due to come back to work on Wednesday, but didn't call until Thursday, so Morgan classified her as a no call, no show, job abandoned. She also said Robert Echoes did not call or show up on Monday so she decided she needed to replace him. Morgan know that Valentine dropped her son at the center prior to 11 a.m. (and went to her day job), but said that Valentine said nothing about coming to work her 5 to 8 p.m. shift later that day. She said Dwight Mobley called her at 9:55 a.m. to say his car had broken down and asked if someone could get him, but she told him no, he was terminated because he had been given verbal warnings about being late.

Morgan testified that she used a progressive discipline system embracing a verbal warning, a write up, after a second writeup a 3-day suspension, and after a third writeup, then termination. None of the alleged discriminatees had ever been suspended except Ellerbe who was suspended for falling asleep in the classroom, at a time Morgan could not remember. She also said that at the July 26 meeting, employees were told that there would be a new personnel handbook, that a lot of rules were going to be changed, that the policies discussed would be implemented and enforced, and that this was their final and last warning. She said the new rules were issued in writing on Tuesday, July 29.

III. DISCUSSION

The issues in this case arose when the Respondent suddenly terminated 10 employees. These discharges occurred on Monday, July 28, following a mandatory Saturday staff meeting in which the employees were asked or told to sign a noncompetition agreement and those discharged were among those who opposed and did not agree to sign the agreement at the point in the meeting when the documents were collected from the employees. Most of these same employees were observed by management together in a parking lot discussion after the meeting and, at the time of their discharges and thereafter they were not told that their discharges were for attendance or tardiness problems, or because they had threatened not to work, and they were not given written notice of the reasons for discharge. Otherwise, nine of these employees gave credible testimony that various members of management told them that their discharges were because of their failure to sign the noncompetition agreement.

The basic issues are clear and direct. First, were the discharged employees engaged in a protected, concerted activity, and second, did the Respondent terminate them because it was motivated to do so by their participation in that activity.

A. Procedural Matters and Credibility

During the course of the hearing, the Respondent's consultant made numerous and repetitive procedural objections, including a motion that I disqualify myself. The latter request was the subject of motion and appeal during the 65-day recess in the trial between March 6 and May 11, 1998. None of these matters were pursued on brief and I reaffirmed my rulings made at the hearing and in the Order issued on the disqualification matter. Although the Respondent has waived its opposition to these matters because the nature of many of these objections tended to interfere with my authority to regulate the course of the hearing and because they also bear some relationship to my credibility findings, I find it necessary and desirable to briefly review some of those rulings.

(1) *Evidentiary Rulings and Disqualification*. This subject was addressed in the Order dated April 30, 1998, which rules as follows:

> A hearing in this matter was adjourned on March 27, 1997, and set to continue on May 11. A motion to continue the hearing and a request for special permission to take interlocutory appeal were filed by the Respondent on April 28, 1997, and referred to me the next day by the Deputy Chief Administrative Law Judge. As noted in the referral letter, the Respondent's oral motion that I recluse myself was not properly filed in accordance with the requirements of Rule 102.37 inasmuch as the motion was not accompanied by a "timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification."

Under these circumstances, the request, which now is accompanied by an affidavit, will be treated as a motion to disqualify.

On review of the request and affidavit, I find that it is insufficient on its face to show personal bias that would require disqualification.

First, based on the objection of the General Counsel and because the material had already been read into the record, I rejected the Respondent's offer as an exhibit of witnesses' affidavits to the Board, and for the same reasons, I found it to be unnecessary to have them placed in a rejected exhibit file. Although a party normally has the right to have a rejected exhibit placed in a rejected exhibit file, the Board in *Manbeck Baking Co.*, 130 NLRB 1186, 1189–1190 (1961), found that the trial examiners refusal to permit a respondent to copy so called Jencks statements (not received as part of the record), was not an abuse of discretion and was not prejudicial. Here, the rejected exhibits are duplicative inasmuch as portion assertedly bearing on the witness' credibility had been read into the record, accordingly, it was not a disqualifying abuse of discretion to attempt to avoid delays and impediment to the hearing process by rejecting the Respondent's request.

Otherwise, my rulings on evidentiary matters were not unilateral but were made in response to objections by the General Counsel and were made in a manner consistent with Board precedent and the duties of a judge expressed in *Manor West Inc.*, 311 NLRB 655, 669 (1993), which accepted the judge's:

> [I]ntention, aggressively, to preserve and protect the record from the clutter and distraction of incompetent and nonprobative proffers—always inimical to timely decision and effective review—and to provide guidance to counsel as to what was expected of them by communicating on the record and in straightforward terms my reasons for acting for or against their wishes.

This decision also notes that subsection 102.35(f) of the Board's Rules authorize the administrative law judge to regulate the course of the hearing, and that:

> The exercise of this authority is by no means contingent on the wisdom, good sense, qualifications, disinterest, or perceptions of others. The procedural scheme assumes that the independence, objectivity, and expertise of the administrative law judge would lead to a fair, orderly hearing, and that should unruly, impertinent, and ponderous behavior threaten the process, the judge, not opposing counsel, should intervene to control that which by definition impinges on that endeavor. Simply put, the judge does not sit as a marmoreal witness to endless maneuvering that tends to obscure truth, to cause delay, or in the end, to prevent a just result.

The hearing was adjourned at the request of the Respondent after the General Counsel rested. The Respondent will have the opportunity to present relevant and material evidence in its case in chief and will thereafter be able to file a brief addressing the proper application of Board law to the overall record and any perceived errors in trial rulings.

Under these circumstances, the rulings and the accompanying statements made during the first stage of the trial do not show the conditions necessary for a bias or prejudice recusal, see *Liteky v. U.S.*, 114 S.Ct. 1147, 1157 (1994), and accordingly, I find that good cause had not been shown that would warrant a grant of the relief requested (footnote omitted).

As required by Rule 102.37, the hearing must now proceed and, inasmuch as a further delay in the timely conclusion of the hearing in this proceeding would unduly prolong the conclusion of the trial stage and ultimate disposition of the matter, the Respondent's motion for a continuance is denied, and the hearing will resume as scheduled at 9:30 a.m. on May 11, 1997.

(2) *Objections to Alleged Hearsay Testimony*. During the witnesses' testimony, several employees noted what was said by declarants who were other alleged discriminatees at both the Respondent's staff meeting and in the employee gatherings after the meeting and the Respondent made repeated objections. First, it is noted that the declarant's would be (or had been) under oath and subject to confrontation and cross-examination. More specifically, it was noted in my rulings that in many instances the statements were "verbal actions" that tend to establish an effect on the hearer that might lead him or her to take some further action and were not necessarily for the truth of the matter and therefore were non hearsay statements. As stated in the summary of standard procedures attached to the Regional Director's complaint in this proceeding:

> Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

It therefore was unnecessary for Respondent's consultant to repeatedly advance its objections. Moreover, it is well established that the Board can admit hearsay evidence "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's Inc.,* 285 NLRB 169 fn. 3 (1987), and I find that the Respondent had no valid basis for failing to understand or comply with the trial rulings in this regard.

(3) *Affidavits*. Although it is clear that a Respondent has the right to review the General Counsel's witnesses' affidavit on appropriate request, that right does not convey an unfettered privilege to endlessly pursue any and all subjects noted in an affidavit. Here, the Respondent's consultant reviewed the affidavits and then proceeded to conduct his cross-examination by asking witnesses if they had made the statements reflected in the affidavits. The witnesses generally agreed that they had, and, in substantial part, these statements reaffirmed what the witnesses had stated on the direct examination by the General Counsel. On some occasions the consultant pursued question regarding subjects that were not in the affidavit. It is well settled that omissions in an affidavit hardly amount to impeachment, see *Redway Carriers*, 274 NLRB 1359, 1371 (1985), and, otherwise, the style of examination (on the affidavits), utilized by the consultant consistently failed to generate any new or material evidence that in any manner added to the development of a meaningful record. It is appropriate to compare a witnesses' original sworn statement with their accounts of the same events given during the direct testimony, however, if there are no material discrepancies or shifts in the witnesses' testimony, then it is absolutely pointless for a Respondent's representative to assertedly "cross examine" a witness by having him/her reaffirm the corroboration statements in their sworn affidavits. Accordingly, I find that the consultant's continued insistence on his singular course of examination was inappropriate.

(4) *Custody of Affidavits and Subpoenaed Documents*. During the course of having several prolonged disputes arose in which the Respondent's consultant resisted the General Counsel's request that a witness' affidavit be returned to the General Counsel on the conclusion of the witness' testimony and otherwise, he repeatedly contested the General Counsel's possession of subpoenaed employer's personnel records.

While it is customary and desirable that the witness' affidavit be returned in a timely manner when the witness is excused, the trial judge has the discretion to allow the Respondent to reexamine the statement or to allow it to be retained for legitimate trial purposes, see *Manbeck Baking,* supra. Here, no specific or persuasive purpose was shown for retention of the document and the prompt return of the material was not prejudicial to the Respondent.

Conversely, the General Counsel objected to the Respondent's demands that he return the subpoenaed personnel records. It appears that in most proceedings, the parties' representative cooperatively make mutually agreeable accommodations concerning the custody and availability of subpoenaed documents. Where such accommodations cannot be agreed on, the trial judge has basic discretion to rule on these matters and

to dictate accommodation that recognize special needs of a respondent, however, the General Counsel is empowered to inspect and copy subpoenaed evidence of any person being proceeded against, see *NLRB v. Wilson*, 335 F.2d 449 (5th Cir. 1964). The entitlement of the General Counsel carries with it the right to make relevant inquiries about the documents or to have them relevant documents entered into evidence and thus the General Counsel must have reasonable access to the material at any time during the trial, including rebuttal. In a similar vein, a Respondent can be allowed access to the material insofar as it is necessary for relevant cross-examination or for the presentation of its direct case, however, except for these reasons, or for the discretionary accommodations discussed, it is not error to allow the General Counsel to retain primary custody of the subpoenaed documents during the entire course of the trial.

While it is desirable in the ordinary case for any subpoenaed material to be returned in a timely manner, the instant case presented a situation where the Respondent's consultant consistent was unwilling to enter into stipulations and, on cross-examination, he persisted in pursing a tangential line of defense in which he attacked the work habits and histories of the alleged discriminatees and, accordingly, his own actions mandated the need for the General Counsel to protect his interest by seeking to retain custody of the personnel records during the course of the trial.

(5) *Cross-examinations of Witnesses and Credibility*. Due process requires procedures and rulings that protect both the interest of the charging party and the Respondent to the maximum extent possible without impingement of one on the other. See *Machinists v. Street*, 367 U.S. 740, 761–764 (1961). Here, the consultant's dissatisfaction with the answers he obtained when he examined the General Counsel's witnesses or his inability to elicit from them responses he would have preferred, does not convey some license to endlessly pursue tangential matters and it can hardly be twisted into some concept of denial of due process (or bias by the trial court), when efforts are made to control the development of a proper record.

Here, the consultant initially was given a broad range of latitude with the first five witnesses. Thereafter, it was the view of the trial court (as also reflected in objections by the General Counsel), that the Respondent was going beyond the bounds of proper cross-examination, was pursing cumulative and irrelevant matters, and was going beyond the scope of direct examination. While cross-examination can aid in the development of a complete record, it is not properly a vehicle for "a fishing expedition," argument, or the presentation of a Respondent's direct case. Cross-examination is not a game that must be played in order to impress a client and a client often may be served best when no questions are asked. While it certainly is proper and often necessary to clarify or elaborate on certain matters or to challenge the memory or credibility of certain witnesses, it is not proper cross-examination to merely repeat matters addressed on direct, to reaffirm noncontradictory matters mentioned in affidavits, or to seek to present one's own direct case by indirectly asking employees about the actions of supervisors and agents or about matters that are principally within the knowledge of management.

Continued cross-examination may be ended at the discretion of the trial judge when it degenerates into a fishing expedition, when it becomes coercive, when there is no development of material or relevant evidence or of contradictions, where there is no reason to believe there are inconsistent declaration or matters that would impeach the witnesses credibility, and where no foundation is laid that further inquiry would reasonably disclose some relevant new evidence, see *Classic Coach*, 319 NLRB 701, 717 (1995). Here, the consultants' examination basically degenerated into a pursuit of tangential matters that merely detracted from the development of the record necessary and useful for evaluation and resolution of the issues involved. Moreover, the consultant's attempts to probe the credibility of the witnesses also degenerated into attempts to undermine by innuendo and misdirection into collateral matters. While certain situations may favor latitude in the scope of cross-examination in order to expedite the hearing, it is clear that the consultant's approach in this proceed was a clear hindrance of the trial judge's attempts to regulate and expedite the course of the hearing as well as an impediment of the rights of the General Counsel and the rights of the alleged discriminatees.

Here, for example, the consultant asserted "hearsay" when a witness spoke of what others had said in the parking lot, yet when the other declarant was called, the consultant basically attempted to impeach by challenging the statements in the witness' affidavits rather than asking questions about what the declarant said or about what was said on direct testimony. My evaluation of the witness' demeanor under these trying circumstance, leads to the conclusion that they were truthful and believable and gave honest answers to the best of their ability. Not everyone who witnesses an accident or a crime or who attends a meeting will remember the event in precisely the same way, however, the difference in detail does not make the witness' testimony any less honest. Here, there was some obvious confusion or misunderstanding about what actually was said by Administrator Jackson and Pastor Johnson but it is clear that certain employees made comments, attempted to ask questions and, after the meeting, generally congregated in a small group or groups in the parking lot to discuss the events of the meeting, most particularly the noncompetition agreement. These witnesses also gave highly credible testimony about their attempts to return on their next scheduled work days. Although Director Morgan and others were called as witnesses by the Respondent, their testimony often failed to address any specific discussion of the actual occurrences described by the alleged discriminatee as they were discharged and, in the relevant instances where it conflicts with the testimony of the alleged discriminatees, I find the latter testimony to be more credible. The Respondent's management testimony regarding asserted disciplinary related reasons for their discharges is not supported by any showing of contemporaneous knowledge or documentation (for example, no staffing schedule for July 28 was presented that might have supported Morgan's testimony about the employees' starting times) and, as found below, it appears to be pretextual. Otherwise, the testimony by the alleged discriminatees that they were told that they were being discharged because they failed to sign the noncompetition agreement is found to be highly credible and I find that such statement were made not only at the time of the discharges but also that threatening statements of a similar nature were made by management officials during the course of the staff meeting.

B. The Mass Discharge

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate them. Here, the record shows that Respondent's management was aware that the alleged discriminatees had spoken up at the meeting to voice their concern about signing the noncompetition agreement, that they gathered together in the parking lot after the meeting and that they refused to sign the agreement at the meeting. Here, the concerns of the employees were being presented to management in concert as they attempted to question Administrator Jackson and Pastor Johnson and as they stated their opposition to management's new limitation on the terms of their employment. It is clear that several persons spoke up on this matter, including several of the alleged discriminatees and that those who spoke had the support of those who gathered with them in the parking lot after the meeting and the support of those who, contemporaneously refused to sign that agreement. The fact that the individuals initially may have acting alone or in response to their own immediate interest does not make their contemporaneous actions any less concerted, and I find that their actions were concerted and for their mutual aid and protection. See *Circle K Corp.,* 305 NLRB 932 (1991), enfd. 989 F.2d 498 (1993); *Monongahela Power Co.,* 314 NLRB 65 (1994); *Compuware Corp.,* 320 NLRB 101 (1995); and *Rogers Environmental Contracting,* 325 NLRB 144 (1997).

The Respondent clearly was annoyed by the repetitive nature of some of the questions and the apparent fact that some employees were challenging what its managers thought was a necessary change in its terms of employment for its teachers and aids in order to stem a perceived loss of enrollment. Here, there is direct evidence that several specific employees attempted to voice their concerns at the meeting, and thereafter, and Jackson admits that she was aware of many of those who were together in the parking lot. Moreover, the Respondent's management even asserts that they knew or believed that these same employees, (especially Nelson), had discussed not coming to work on Monday and that it was for this reason that they made alternate staffing arrangements (the Respondent's own witness, Vanessa Miller, also testified to this effect). Thus, it cannot now assert that it did not know of the protected activity or know that they were acting together. Of course, if they had collectively decided to engage in a work stoppage for the same reasons of their concerns, it also would have been a protected concerted activity and it would be a violation of the Act for the Respondent to discharge them for that activity, see *Eaton Warehousing Co.*, 297 NLRB 958 (1990), and *Consel Security,* 325 NLRB 138 (1998). The timing of the terminations, immediately after they had complained at the meeting, helps to show that the General Counsel has met the threshold requirements for showing protected concerted activity and motivation and, under these circumstances, I find that the General Counsel has met his initial burden by presenting a showing sufficient to support an inference that the employees' concerted activities were a motivating factor in Respondent's subsequent decision to terminate them. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line,* 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.,* supra, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

On brief the Respondent's defense notes the legitimacy of its concerns about adequately staffing employee attendance, and state regulations and then list the asserted reasons, principally for assertedly showing up late or not at all, why Director Morgan terminates the alleged discriminatees. Its principal arguments, however, are based on the citation of cases, finding, or stating that an employer can have a reasonable ground to discharge employees who threaten not to work. Here, there is no showing the individuals at the Center were "at risk" children such as those in *K-Bar-B Youth Ranch*, 325 NLRB 409 (1998), cited by the Respondent. Moreover, the employees in *K-Bar-B Youth Ranch* actually had called in "sick" where as in the instant case Respondent's knowledge was of the purported that Jackson's encounter in the parking lot after the meeting with Nelson and her belief that about employees would not show up on Monday because Nelson had commented that "you need us more than we need you" (comments not admitted to by Nelson).

The question here is not whether or not the Respondent had the right under Ohio law to discharge an employee for refusing to sign a noncompetition agreement or whether that agreement might be considered to be on unenforceable and unreasonable restrictive covenant. Here, the alleged discriminatee are shown to have been terminated because they engaged in conduct in which they complained or voiced their concerns about the agreement and because they grouped together after the staff meeting to jointly discuss their concerns on this matter.

The Respondent, in the wake of its failure to have all of its childcare/teacher employees immediately agree to sign the agreement, took steps to have alternative coverage of it staffing needs for Monday, including the hiring of one new employee, and it then summarily fired 10 employees who had spoken up against the agreement, had not signed the agreement, or had (it suspected) joined in a group discussion about what the employees could or might do about the restrictive agreement.

Respondent's argument to the contrary, there simply is no persuasive or credible evidence that would show that Jackson or anyone in management had any real belief that the 10 subsequently terminated employees were threatening to refuse to work. At most, its asserted belief appears to be self-serving speculation that is at odds with its statement and conduct at the meeting and on Monday when various members of management interacted with the terminated employees. In no instance were the terminated employees ever told they were being terminated for threatening not to work and, significantly, none were ever given written documentation or reasons of any sort for their discharges.

As noted above, I have found the testimony of the alleged discriminatees (and Rainey's mother) to be credible and I find that they truthfully described how they were told that the reason that employees were terminated was their failure or refusal to sign the noncompetition agreement.

The Respondent's termination reasons, such as tardiness, etc., stated at the hearing, were not communicated to most of the employees (except Ellerbe), and it is apparent that the rea-

sons (and the attendance reports on which the reasons were based), were developed after the individuals were terminated. As of Monday, when they were terminated, the alleged reasons were not founded on any meaningful investigation and, otherwise, I find it highly unlikely (especially in regard to the Respondent's great concern with being staffed in compliance with state ratio guidelines), that Director Morgan spontaneously took it upon herself to immediately terminate 10 employees for alleged transgressions, without resort to the progressive disciplinary system and without resorts to the advice of more senior management and I do not credit Morgan's testimony that various employees were in fact late that day or were fired in the manner she described, or that she "was not instructed to terminate any individuals that morning." Here, the individuals were not allowed to explain or defined themselves, they were not told the reasons latter asserted by the Respondent but instead actually were told that it was because of their refusal to sign the agreement and they were not accorded the expected due process of the Respondent's progressive disciplinary system. Under these circumstances, the false and pretextual reasons and justifications advanced by the Respondent warrant the conclusion that the true motive was the unlawful motive demonstrated by the General Counsel. Correspondingly, the Respondent's reasons completely fail to contribute to its burden to persuasively show that this mass firing would have occurred even in the absence of their protected concerted activity. The mere fact that it chose, for some reason, not to immediately terminate employees' Selina McClure and Laconya Beach who apparently also did not sign the agreement, does not excuse the fact that it did take retaliatory action against the alleged discriminatees.

The total record shows that the Respondent's reasons for its action are pretextual, inconsistent, and otherwise so unpersuasive that the Respondent cannot be found to have shown that it would have discharged these employees even in the absence of their protected concerted activity. Accordingly, I conclude that the General Counsel has met his overall burden and shown that the Respondent's mass discharge of employees who had protested their being required to sign a noncompetition agreement violated Section 8(a)(1) of the Act.

C. Misconduct

During the course of the hearing Consultant Blankenship engaged in an intermittent yet persistent pattern of conduct that repeatedly interfered with the trial judge's attempts to regulate and expedite the hearing. This conduct included attempts to argue and debate rulings, speech making and asides, and lack of cooperation in dealing with documentation and stipulation of essentially uncontested matters. The consultant's apparent misdirection into tangential areas appeared to be a possible calculated attempt to generate a basis for a claim of bias, a claim which was made on the second day of hearing, and a claim that was pursued during the 65-day recess before the hearing resumed. This claim was found to be unjustified for the reasons noted in the Order set forth above in part A(1) of this section.

On resumption of the hearing Consultant Blankenship again engaged in conduct that was inherently disruptive and he again seem unwilling to listen to, accept or understand rulings, or to comport with nondisruptive standards of behavior. I find that his representation went well beyond an allowable level of aggressive avocation and to the point of being clearly obstreperous. My review of the record and my evaluation of his overall demeanor and conduct during this matter compels the conclusion that Consultant Blankenship is either unwilling or unable to conduct himself in a manner consistent with the level of acceptable behavior and decorum that should exist in proceeding before the Board and under the Administrative Procedures Act. Under these circumstances I find it necessary to recommend that the Board refer this matter to the General Counsel for institution of appropriate disciplinary action.

IV. CONCLUSIONS OF LAW

1. The Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employees Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and LaShon Valentine (Davis), Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. The actions of Consultant Rayford T. Blankenship during the proceeding were inherently disruptive and displayed an unwillingness or inability to conform and comply with acceptable standards of behavior and constitute misconduct.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary action, it is recommended that Respondent be ordered to reinstate employees Elaina Bohanon, Robert Echoes, Kevin Ellerbe, Nekia Frye, Tiffany Johnson, Donna Mobley, Dwight Mobley, Ursula Nelson, Cecelia Rainey, and LaShon Valentine (Davis), to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned during their suspension or from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

The Respondent also shall be ordered to remove from its files any reference to the discharges and notify all these employees in writing that this has been done and that evidence of the unlawful discharges will not be used as basis for future personnel action against them. Otherwise, it is not considered necessary that a broad order be issued.

In accordance with the Board's Rules governing misconduct by party representatives during a hearing, see Section 102.177(b), due notice is hereby given that a review of the record in this proceeding demonstrates the presence of good cause that would support a finding by the Board that the Respondent's representative should be admonished or repri-

[3] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

manded. Accordingly, it is further recommended that the Board refer this matter to the General Counsel for appropriate disciplinary action.

[Recommended Order omitted from publication.]